Supreme Court, U.S.
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No. 90-1611

In The

# Supreme Court of the United States

October Term, 1990

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

*Petitioner,*

vs.

LEONARD J. KOIRE,

*Respondent.*

**Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this Court should add this case to the others which it has remanded to state courts to determine compliance with principles enunciated in *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. ___, 111 S.Ct. 1032 (1991).

2. Whether the Court should hold the awarding of punitive damages by California courts to be violative of the Due Process Clause of the 14th Amendment to the United States Constitution.

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## STATEMENT OF THE CASE

Respondent Koire, an individual, has been insured under a disability insurance policy issued by petitioner TransAmerica. After paying him benefits under that policy for certain forms of disability, TransAmerica decided that injuries respondent sustained in a fall, though disabling, were merely a continuance of an earlier sickness and refused to resume payments under the policy, petitioner's responsible executive accusing respondent of being a "deadbeat".

Although the fact was uninvolved in the denial of the claim, petitioner knew that respondent, a small businessman, is afflicted by various manifestations of lung cancer and therefore in position of unusual dependence on the insurance benefits.

Respondent sued for the benefits and was awarded compensatory and punitive damages in a jury trial. These awards were reviewed by the trial judge on new trial motion and found not to be excessive. Petitioner appealed, urging several grounds of a nonfederal, state-procedure nature; also challenged was the constitutionality, vel non, of the awarding of punitive damages. The California Court of Appeal, by an unpublished (and therefore nonprecedential) opinion, reviewed on appeal but affirmed the trial court judgment in its entirety. The state Supreme Court, in the exercise of its discretionary powers, declined to review the decision of the Court of Appeal and petitioner sought certiorari in this Court.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I.

### REMAND TO THE STATE COURTS FOR EXAMINATION OF PROCEDURAL DETAIL, NEVER BEFORE SOUGHT BY PETITIONER, WOULD BE INAPPROPRIATE

Petitioner now has decided that this case should be added to others which have been remanded *after* grant of certiorari, in order to cause the state's courts to examine the procedures utilized in California to process claims of invalidity of specific punitive damage awards.[1] There are at least two reasons why this newly articulated quest should not prevail.

First, it ignores a rather conspicuous distinction between the other cases remanded and the instant case: In all the others, certiorari had already been granted, while in this case it has not. It is judicially noticeable fact (stressed in this Court's opinion in *Haslip, supra,* and elsewhere), that punitive damage litigation is not an isolated rarity in the United States today, but rather a form of litigation which is finding considerable utilization in the lower courts around the country. Thus, it may safely be assumed that the instant case is far from being the only decision of a state court or a lower federal court in which appellate review by one side or the other is in progress today. By parity of reasoning with petitioner's current thesis, this Court would be obligated to grant certiorari in every one of those other cases and return

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[1] Petitioner also notes that certain other cases in which certiorari had been granted have been remanded to other jurisdictions [Petition, p. 6, fn. 3].

them to the courts from which they come, with advice to puzzle through the state and lower federal procedures employed in each of those cases.

That, respondent submits, is not the way this Court operates; rather, it assumes that the cases in which certiorari is granted will be the vehicles of change in procedure. It does not go about the country, sweeping all other litigation into a sort of collective certiorari rag bag and shipping the contents to whatever jurisdictions may be involved.

Second, this aspect of petitioner's urging is a brand-new position never taken in the trial court or the state appellate tribunals. While it is true that petitioner raised, in the lower courts, constitutional issue as to whether the awarding of punitive damages was intrinsically violative of 14th Amendment Due Process, petitioner did not raise, at any stage before its petition for certiorari, any claim that the procedures followed for appellate review were in any way constitutionally defective. It is one thing to say that an entire form of relief is invalid, quite another thing to say that the specific procedures adopted for post trial review in a specific case were somehow amorphously deficient and to ask this Court to have it all done over again. Until now, petitioner said the former; now, it has changed its thrust abruptly and improvidently.

## II.

## CALIFORNIA'S POST-JUDGMENT REVIEW OF PUNITIVE DAMAGE AWARDS AFFORDS ADEQUATE DUE PROCESS TO DEFENDANTS.

There is some irony in petitioner's seeking to override the still-drying ink of *Haslip* by invoking the

supposed deficiencies of California's treatment of punitive damages. In point of fact, that state has some of the most sophisticated jurisprudence in the field and both legislative and common law precepts guide both the trier of fact and the trial and appellate courts on the subject of punitive damages.

For example, one finds the California statute requiring, at the outset, not only that specific and precisely defined characteristics are prerequisite to a punitive damage award – oppression, fraud or malice, each of which is in turn legislatively defined – but also that any such threshold of liability be based on "clear and convincing evidence" (California Code of Civil Procedure § 3294(a) and (c) [Petition, A-72-73]). Of interest is the fact that in *Haslip* it is said that: "There is much to be said in favor" of requiring a higher standard of proof, but the Court was not persuaded that the Due Process Clause required as much as California has itself enacted (111 S.Ct. at 1046, fn. 11).

The decisional attention to the matrices of punitive liability has, of course, been episodic, but that attention has had the opportunity to be quite well developed by the state. For instance, it is now required that a California verdict clearly segregate the punitive increment of any recovery from other forms of damage (*Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 927, 148 Cal.Rptr. 389, 582 P.2d 980 (1978)). Moreover, it is settled that, not only is the jury's assessment of punitive damages subject to review by the trial judge on motion for new trial and remittitur, but also the amount is subject to subsequent review on appeal for both passion and prejudice on the part of jurors and the more common variety of excessiveness as a

matter of law (*Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 823-824, 157 Cal.Rptr. 482, 598 P.2d 452 (1979)).

For further example, the appellate decisions have clearly spelled out the factors to be considered in reviewing an assessment as being:

> – The particular nature of the defendant's acts in light of the whole record;
>
> – The amount of compensatory damages, to which a punitive award must bear a reasonable relationship; and
>
> – The wealth of the defendant and the effect thereof on the function of deterrence.[2]

There is no reason to presume in advance that either the California courts or the California Legislature will be insensitive to the factors this Court found significant in *Haslip* to the extent that those factors are not already part of California's law. This Court should await the developments on the scene – including any steps taken in response to the remand of the cases in which certiorari had already been granted (see *supra*, Section I) – before assuming a role as co-maker of state law.

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[2] The state Supreme Court has said that the function of deterrence will not be served "if the wealth of the defendant allows him to absorb the award with little or no discomfort", but also "by the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter" (*Neal, supra*, 21 Cal.3d at 928 [14]).

## CONCLUSION

For the reasons stated above, and sensitivity to the relative newness of the *Haslip* decision, the petition for certiorari should be denied.

Respectfully submitted,

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